

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FILED

OCT 29 2018

Clerk, U S District Court  
District Of Montana  
Billings

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

WAYNE BLUEFORD,

Defendant/Movant.

Cause No. CR 00-054-BLG-SPW  
CV 16-180-BLG-SPW

ORDER DENYING § 2255  
MOTION AND GRANTING  
CERTIFICATE OF  
APPEALABILITY

Defendant Blueford filed a motion under 28 U.S.C. § 2255 seeking relief based on *Johnson v. United States*, \_\_ U.S. \_\_, 135 S. Ct. 2251 (2015). On September 12, 2018, the Court of Appeals held that such motions are untimely until the Supreme Court extends *Johnson* to other contexts. *See United States v. Blackstone*, 903 F.3d 1020, 1023 (9th Cir. Sept. 12, 2018).

Blueford was sentenced as a career offender under the mandatory guideline sentencing regime. He argues that *Blackstone* was wrongly decided but acknowledges this Court cannot rule on that basis. Disposition of his motion is controlled by *Blackstone*.

“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rule 11(a), Rules Governing § 2255 Proceedings. A COA should issue as to those claims on which the petitioner

makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Court previously found that, under the applicable precedents, he did. *See* Order (Doc. 79) at 14. Where a claim is dismissed on procedural grounds, the court must also decide whether “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012).

*Blackstone* rejects Blueford’s claim that he was deprived of a constitutional right and also imposes a time bar. In the Seventh Circuit, however, Blueford would likely prevail on the timeliness issue. *See Cross v. United States*, 892 F.3d 288, 293–94 (7th Cir. 2018). In addition, Ninth Circuit precedent predating *Booker v. United States*, 543 U.S. 220 (2005), held that the United States Sentencing Guidelines were open to constitutional due process challenges. *See, e.g., United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997). Reasonable jurists could disagree with this Court’s disposition of the case. A certificate of appealability is granted on the issues of (1) whether Blueford was arbitrarily sentenced as a career offender and (2) whether his § 2255 motion is time-barred.

Accordingly, IT IS HEREBY ORDERED:

1. Blueford’s motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. 128) is DISMISSED WITH PREJUDICE as time-barred.

2. A certificate of appealability is GRANTED on the issues of (1) whether

Blueford was arbitrarily sentenced as a career offender and (2) whether his § 2255 motion is time-barred. The clerk shall immediately process the appeal if Blueford files a notice of appeal.

3. The clerk shall ensure that all pending motions in this case and in CV 16-180-BLG-SPW are terminated and shall close the civil file by entering judgment in favor of the United States and against Blueford.

DATED this 29<sup>th</sup> day of October, 2018.



Susan P. Watters  
United States District Court